

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

76-1576

**United States Court of Appeals
For the Second Circuit**

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UNITED STATES OF AMERICA,

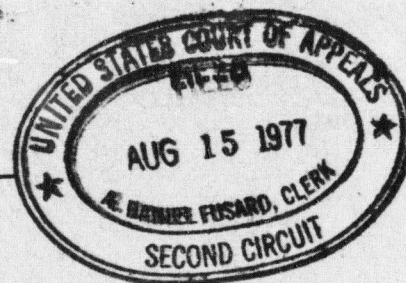
Appellee,

-against-

RICHARD G. WARME, a/k/a RICHARD WARNER, et. al.,
Defendant-Appellant.

*On Appeal From Final Judgment in the
United States District Court for the
Southern District of New York*

APPELLANT'S BRIEF



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ISSUES PRESENTED

1. Did the court below erroneously proceed with the trial despite Warne's involuntary absence, in violation of both Rule 43 F.R.C.P., and Appellant's 6th Amendment right of confrontation? Was such error harmless beyond a reasonable doubt in light of the fact that exceedingly damaging testimony was received in Appellant's absence from a major witness and co-conspirator which directly concerned Warne's involvement in the conspiracy and in consideration of the fact that the court was required to reopen the examination of one of the jurors during his absence? Did the court compound its error by failing to adopt corrective measures upon Warne's return?

2. Did the trial court improperly conclude that Warne's confession was admissible at the trial?

3. Did the trial court fail to consider whether Warne's constitutional rights were infringed by continued questioning despite his requests to speak with an attorney -- a circumstance established by the very testimony of the Federal Agent conducting the interrogation -- and, if so, does such failure require reversal of the judgment of conviction or, in the alternative, a remand to the trial court for resolution of the issue?

4. Did the trial court's failure to determine that Warne's confession was made within six hours immediately following his detention by the police or that any delay was otherwise reasonable, as mandated by Section 3501 (c) of Title 18, U.S.C.

require reversal of the conviction, or, in the alternative, remand to the trial court for resolution of the issue?

5. Did the trial court improperly redact Warne's confession in such a manner so as to prejudice his defense and thereby deny him a fair trial?

6. Did the trial judge violate Section 3500 of Title 18, U.S.C. by refusing to permit defense counsel to obtain relevant statements of witnesses relating to the subject matter of their direct testimony?

PRELIMINARY STATEMENT

Appellant, RICHARD G. WARME, appeals from a judgment of the United States District Court, for the Southern District of New York, rendered November 16, 1976, convicting him, after a trial before Judge Milton Pollack and a jury, of the crime of conspiracy to violate Section 473 of Title 18, United States Code, in violation of 18 U.S.C. § 371, and sentencing him to a prison term of three years.

The three remaining substantive counterfeiting charges contained in counts 2, 3 and 4 of the indictment, upon which the jury was unable to agree upon a verdict, were subsequently dismissed by the Court below.

Appellant is currently at liberty on bail pending appeal.

STATEMENT OF FACTS

THE GOVERNMENT'S CASE

Sometime during the months of November or December, 1975, Bernard Horowitz was introduced to James Heimerle by Joseph Peters at a local Queens tavern. Horowitz had known Peters since they had met sometime earlier while both were serving prison sentences (18, 145, 147, 315)*. During the course

* Unless otherwise indicated, references are to the type-written minutes of trial.

of their meeting, Heimerle indicated that although he was still residing at a halfway house, he had recently been given a quantity of counterfeit money which he was interested in selling (24, 324). The bills Heimerle wished to sell consisted of \$100 notes having a yellowish tint which was of exceedingly poor quality. At that time, Horowitz indicated that Heimerle could not expect to receive anywhere near the going rate of 12 points on the dollar for the bills he desired to sell (25-26). However, it was agreed that Horowitz would attempt to contact others who might be interested in acquiring the \$100 notes (26-27).

Within about a week's time, Horowitz contacted the appellant Richard Warne, who had indicated that he was interested in making some fast money due to his "tight money situation" (27-28). A meeting was arranged which took place shortly thereafter at the Cross County Diner in Yonkers, New York (27-28, 324, 325, 394-399). When they arrived at the Cross County Diner parking lot, Heimerle and Peters were introduced to Warne by Horowitz (28, 324). After Horowitz completed the introductions, Horowitz, Peters and Heimerle entered Warne's automobile. By way of explanation, Heimerle indicated that he had received the counterfeit \$100 bills as a present from certain individuals who were pleased with his having "kept his mouth shut" when he was arrested previously (28-30, 324-326, 394-399). After Warne agreed to purchase \$1500 worth of counterfeit \$100 bills, the four men drove to a garage owned by Warne's employee where the exchange took place

(30-32, 150, 152, 326-327, 394-399). After Warne left, Horowitz proceeded to find Heimerle another buyer. He brought both Heimerle and Peters to a location in the Bronx where they met a young man named "Fat Joey" who purchased a quantity of the \$100 bills from Heimerle (33-37, 331-332).

Following his acquisition of the yellowish-tinted \$100 bills, Warne met with an old friend, Angelo Oliverri, his son, Robert Oliverri, and Robert's close friend and employer, Lawrence Marissi, at the latter's wholesale cigarette distributing outlet, Palumbo Distributors, located on Westchester Avenue, in the Bronx. During this meeting, Warne showed what appeared to be a photostatic copy of a poor quality counterfeit \$100 bill to the Oliverris and Marissi. When Warne indicated that he would be getting more counterfeit of a higher quality, the three men agreed to buy \$10,000 worth of the yellowish \$100 bills for \$800 in cash (191-196, 250-254, 285-288, 231). Angelo Oliverri eventually sold this batch of counterfeit to one Joe Corbo* who, in turn, entered into a sale to an undercover agent which eventually led to the arrest of both Corbo and Oliverri (196, 226-227).

After showing several samples of a new batch of counterfeit \$100, \$50 and \$20 bills to the Oliverris and Marissi -- bills which had been supplied to him by Heimerle, Peters and Horowitz -- Warne arranged to have Heimerle and Peters deliver a quantity of

* The stenographic transcript incorrectly refers to this individual as Joe Como. However, this is the same individual referred to later on in the record and correctly identified as Joe Corbo.

these new bills to his home in Irvington, New York (196-198, 325-326, 406). Since Warne did not have the cash on hand to pay Peters and Heimerle, they decided to leave the counterfeit money with them and return later that day for payment (325-328, 406). While they were gone, arrangements were made to have the Oliverris and Marissi examine the counterfeit at Warne's home (196-198, 256-258). Upon inspecting the counterfeit, the Oliverris and Marissi agreed to purchase \$50,000 in counterfeit for a price totalling \$4,000.00 in cash (258-259, 305, 198-199). Since they did not have the money with them, it was necessary for the Oliverris and Marissi to return to Palumbo Distributors in order to raise as much money as they possibly could. Within an hour and 15 minutes they returned to Warne's home with \$2700.00 in cash. Warne agreed to allow them to take the money with the understanding that the \$1300.00 balance would be paid out of the proceeds of the eventual sale of the counterfeit notes (198-200, 258-259, 305-306). When Warne's suppliers, Heimerle and Peters, returned to his home later that afternoon, it was agreed to allow Warne to retain the counterfeit currency although the full amount had not been paid for as yet (326-328, 406).

Before disposing of a portion of the counterfeit acquired from Warne to Joe Corbo, Angelo Oliverri, his son, and Marissi, treated the currency with Tintex dye in order to "age" the bills and make them look older (201-204, 260-266). When it became obvious that the balance of \$1300.00 was not likely to be

paid, Warne requested the return of the remaining counterfeit money (203-204, 338).

On December 10, 1975, while Warne was seated in his automobile along with Peters, Horowitz attempted to pass a counterfeit \$100 bill in Gimbels Department store in the Cross County Shopping Center in Yonkers, New York. While he was not placed under arrest at that time, a Treasury Agent was contacted and Horowitz's name was taken with the bill being seized as counterfeit (63-67, 341-342, 399-403).

In an endeavor to dispose of approximately \$50,000.00 in counterfeit currency, Horowitz suggested that he might be able to convert the bills to cash with the assistance of a friend of his who was a pit-boss at a Las Vegas casino. After Horowitz, Warne and Peters treated the \$100 bills with stain and a hot iron at Horowitz's apartment, Warne gave Horowitz a check to obtain an airline ticket. When a local travel agent refused to accept the check, the three men proceeded to Kennedy Airport where Horowitz purchased the ticket with the check given him by Warne and then flew to Las Vegas. It was understood that Horowitz was to attempt to sell the counterfeit currency for 12 points on the dollar (38-57, 156, 162-163, 181-182, 343-347). According to Horowitz, when he arrived in Las Vegas he proceeded to Ceaser's Palace, checked his travel bag containing the counterfeit currency with the Bell Captain and, after his room was burglarized and six counterfeit bills as well as his airline ticket was stolen, he

immediately returned to New York and returned the counterfeit currency to Peters (58-61, 347).

On January 4, 1976, two Dobbs Ferry Police Sergeants observed Warne, Heimerle and Peters seated in Heimerle's automobile in the parking lot of the Mayflower Diner in Dobbs Ferry, New York. The automobile was kept under observation for approximately 30 to 45 minutes at which time Warne proceeded to his own automobile and both cars left the parking lot. Each of the Police Sergeants followed one of the automobiles. When each vehicle was stopped at separate locations some distance away from one another, the officers ascertained that the occupants of one automobile consisted of Heimerle and Peters, while Warne was in the other. Neither counterfeit currency nor contraband of any kind was found in Warne's possession or automobile (415-419, 422-425).

Some two days later, on January 6, 1976, Joseph Corbo was arrested by Special Agents of the Secret Service after having sold counterfeit currency to an Undercover Agent. Thereafter, Angelo Oliverri was placed under arrest for having sold \$3500.00 worth of counterfeit currency to an undercover agent (427-430). As a result of Oliverri's arrest, and eventual cooperation with the Government, undercover agent, John Vezaris attempted to buy counterfeit currency from Warne. At that time, the appellant stated that he did not know what Vezaris was talking about and refused to engage in any illegal activity whatever (486).

On March 1, 1976, Special Agents Vezeris and George Hemmer proceeded to a certain location* where at 10:30 A.M. they placed the appellant under arrest and advised him of his constitutional rights. According to the testimony of Agent Vezeris, the appellant indicated that he understood his rights, at which point he was handcuffed and taken to the Secret Service's New York Field Office, located in the World Trade Center (458-460). At that time, he was placed into an interview room, again advised of his rights, and was shown a form known as a Warning and Consent form which he read and indicated he understood. Warne then signed the form in the Agent's presence (460-461 Government's Exhibit "9"; A-404). After the Warning and Consent form was executed a secretary entered the room and transcribed Warne's statement while Agent Hemmer conducted the appellant's interview (465-468, 500-501). According to Vezeris, the statement, which Warne refused to sign after conferring with his attorney at the Field Office later that day, was dictated directly to the stenographer by the appellant (470-471, 500-501; Government's Exhibits "10", "11", and "12-A" for Identification). Shortly before the interview

* While the evidence at trial does not disclose the fact that Warne had been arrested earlier that morning by New York City Detectives in connection with a homicide investigation relating to the death of Angelo Oliverri, and had been interrogated at length by City Police regarding that event, such evidence was developed at the pretrial suppression hearing, discussed infra.

ended, Warne asked for an opportunity to call his wife (471). Later that day an attorney representing the appellant arrived at the Field Office. However, Vezeris testified that Warne did not ask for permission to contact his attorney (471). In this regard, the Agent further stated that Warne never indicated that he wished to stop the questioning, and asserted that neither promises nor threats were utilized to induce his confession (472-473).

THE DEFENDANT WARME'S CASE

The only witness called on behalf of the appellant at trial was Special Agent George Hemmer, whose testimony tended to contradict that of Special Agent Vezeris. Among other things, Hemmer testified that he had told Warne that all of the other co-conspirators had made statements (515). Hemmer further indicated that he observed Vezeris talking to the stenographer while she was writing and prior to typing appellant's statement (522). In this regard, he stated that he did not see Warne dictate a statement to the stenographer (522-523). According to the witness, no waiver and consent forms or written statements were obtained from other co-defendants interviewed, such as Horowitz, Peters and co-conspirator Fred Glock (515-517). Agent Hemmer further acknowledged that it was 'procedure' to have an accused empty his pockets at the office, and admitted further that they had obtained various items from the appellant after he had emptied his pockets at the office (518). When these items were returned to Mr. Warne, the Agents did not obtain a signed receipt from him although that is a normal procedure (519-520).

WARME'S PRETRIAL CONFESSION SUPPRESSION HEARING

THE GOVERNMENT'S CASE

Special Agent JOHN VEZERIS of the Secret Service testified that on March 1, 1976, between the hours of 9:15 and 9:30, a phone call was received at the Secret Service's New York City office which led both Special Agent Vezeris and Special Agent George Hemmer to proceed to the Ninth Division Homicide Squad in the Bronx. When they arrived at that location, they conferred with New York City Detective Joseph Kozlowski, who was conducting an investigation into the death of Angelo Oliverri. Kozlowski had telephoned Vezeris' supervisor, James Heavey, earlier that morning and had indicated that Warme was involved in the homicide (H3-6, 17; A16-19,30).* After waiting approximately 20 minutes, while Warme was still being questioned by New York City Detectives, the Agents met with Warme (H6, 20-21; A19, 33-34). At that time, the Special Agents identified themselves and advised Warme that he was under arrest. He was then advised of his constitutional rights while still at the Precinct Station House (H6-8, 27; A19-21,40). At approximately 10:30 A.M., defendant was handcuffed, placed into the Agents' automobile and the three men proceeded to the Secret Service's office, located in the World Trade Center in Manhattan. Once in the vehicle, Warme

* References preceded by the letters H and A refer to the stenographic transcript of the Hearing and the Appendix, respectively.

was again advised of his constitutional rights which, according to the testimony of Agent Vezeris, he indicated he understood. However, no interrogation was conducted while they were in the automobile (H7-8, 27-29; A20-21,40-42).

Once at their office, the Agents searched Warne and placed him into an interview room where he was shown a waiver of rights and consent form which they read to him prior to his signing the document in their presence (H8-10, 30-31; A21-23, 43-44). In response to Warne's inquiries, Vezeris acknowledged that Warne could exercise an option regarding the execution of the waiver and consent form (H10, 34; A23,47). At that time, Warne agreed to answer questions relating to the counterfeiting investigation being conducted by the Special Agents (H12, 43; A25-26). During the course of the hour long interrogation, Mr. Warne dictated his own statement directly to a stenographer who recorded the events in chronological order (H12-13, 43-44; A25-26, 56-57). During the course of the interview which, according to Vezeris, was conducted primarily by Agent Hemmer, Warne was informed that his accomplice, Bernard Horowitz, was cooperating with the authorities. The witness further indicated that it was possible that the defendant had been told that various other individuals were also cooperating with the investigation (H41-42; A54-55). However, no threats, promises or coercion of any kind was utilized by the Agents to induce Warne's statement (H34-38, 51-52, 58; A47-51,64-65,71).

Although Warne did not request permission to telephone or speak with a lawyer when he first arrived at the office, the Agent testified that the appellant asked to telephone his attorney toward the end of the interrogation. A similar request was made by the appellant in order that he might be permitted to phone his wife (H13, 44-45; A26, 57-58). At that time, Warne further indicated that he was tired (H48; A61). When an attorney, who claimed to represent the appellant arrived at the office, he was given access to his client (H53; A66). Thereafter, the Agents presented Warne with the fully typed statement, which he declined to sign, explaining that his attorney had told him not to sign the document (H15-16, 48; A26-29, 61). At that point, Warne indicated that he no longer wished to speak with the Agents about the investigation (H48; A61). Warne remained at the office for a period of time between an hour and a half and four hours and was arraigned either later that day or the next day (H38; A51). According to Vezeris, the appellant was not handcuffed in any fashion during the interrogation (H54; A67).

Special Agent, GEORGE P. HEMMER, while testifying on behalf of the Government, sharply contradicted a number of statements made by other government witnesses. On direct examination, Hemmer indicated that no promises, threats or other forms of coercion were utilized to secure Warne's statement. He also testified that the appellant was not restrained in any fashion whatsoever while making his statement and had been given a cup of coffee during the course of the interrogation (H59-61; A72-74).

On cross-examination, however, Hemmer made the following pertinent disclosures: After being advised of his rights at the Bronx Precinct Station House, Warne was questioned both there, as well as in the Agents' automobile on the way to the Field office concerning his counterfeiting activities (H63; A76); during the trip from the Precinct to the Field office, Warne's hands were cuffed behind his back (H64; A77); while in the automobile, appellant was informed that the Agents had a lot of evidence against him, indicating further that he was facing a long prison sentence and should therefore cooperate with them (H65-66; A78-79); such cooperation, the Agent noted, could work to his benefit (H66; A79); while Warne made various statements during the trip to the office, Hemmer was unable to recall what those statements were (H69; A82); Hemmer was unable to recall whether Warne requested to speak with or telephone either his attorney or wife while on the way to the office in the automobile (H70; A83); when they arrived at the Field office, Warne emptied his pockets of personal effects which were examined and, in the case of certain papers, photocopied by Secret Service personnel (H70-71; A83-84); while unable to recall whether Warne signed a receipt or voucher when these items were returned to him, the witness testified that it was part of the Secret Service's normal procedures to obtain a signature at the time property is returned to an accused (H71-72; A84-85); while unable to recollect whether Warne was interrogated while one hand was cuffed to the chair in which he was seated, the witness acknowledged that

such a procedure is not unusual and represents a safety factor (73-74; A86-87); Hemmer informed Warne that the other co-conspirators had all made statements (76-77; A89-90).

While Hemmer did not specifically remember Warne stating that if the evidence was so strong they might as well lock him up so he could get some sleep, and indicating that he wanted to be left alone, the witness acknowledged that it was possible that such an incident may have happened (H78-79; A91-92).

When cross-examined about whether Warne had requested an opportunity to speak with or telephone his lawyer when they first arrived at the Field office, the Agent testified that he was unable to recall when such a request had been made. However, in response to the Court's question as to whether the appellant had requested a lawyer before or after he had dictated his statements to the stenographer, the witness replied "he may have asked during" (H81-82; A94-95). At that point the following colloquy occurred between the Court, Agent HEMMER and counsel for Warne (H83-84; A96-97).

"THE COURT: When he asked for a lawyer, did you suspend the statements, or did you keep right on going and say nothing doing?

"THE WITNESS: Your Honor, as far as the sequence of events, I am not positive.

"THE COURT: If a man asks you for a lawyer, do you continue questioning him or do you stop the questioning?

"THE WITNESS: Usually he is permitted to call.

"THE COURT: That means that you stop the questioning and he is permitted to call, is that what you do?

"THE WITNESS: Sometimes.

"THE COURT: Will you brush him off and say never mind all of that, just answer my questions?

"THE WITNESS: If he emphatically wants a lawyer he is allowed to call him or contact him or whatever, or he is allowed to stop the questioning. That is part of his rights.

"THE COURT: That is what he wants to know.

"THE WITNESS: He was quite aware of the fact that he could stop the questioning at any time.

"MR. WEINGARD: Move to strike the last portion of that answer.

"THE COURT: Motion denied.

"Did this man at any time ask for anything that would require stopping the interrogation?

"THE WITNESS: I don't believe so, no.

"MR. WEINGARD: Judge, most respectfully I must object to the last question.

"THE COURT: All right, overruled.

Go ahead with your questioning.

THE COURT: You have been circling and circling

and circling and I would like to get this on the record properly."

Hemmer further testified that when the stenographer was called into the room, Special Agent Vezeris dictated a statement to her (H84; A97).

Special Agent JAMES HEAVEY, the supervisor of the Counterfeiting Squad for the Secret Service New York Field Office, testified that while he was not present when the warning and consent to speak form was executed by Warne, he did observe Warne dictating to a secretary. He also indicated that he observed the Agents talking to the secretary at the same time (H95-96, 98; A108-109, 111). According to HEAVEY, Warne declined to execute the statement, after he had had an opportunity to confer with his attorney at the office (H96; A109). While Warne's attorney was out of the room Heavey discussed the statement with Warne, who admitted that the admissions were true and that he would consider signing the document at another time, but in light of his attorney's advice, he would not sign it then (H92-93, 96; A105-106, 109).

According to Heavey, he neither participated in nor witnessed any threats, coercion or physical force in connection with the interrogation (H90-91; A103-104).

Finally, Heavey confirmed the fact that it is normal procedure to have an accused sign some sort of receipt when property is returned to him at the office (H98-99; A111-112).

THE DEFENDANT'S CASE

Detective JOSEPH KOZLOWSKI, New York City Police Department, assigned to the 9th Homicide Squad, located at the 46th Police Precinct in the Bronx, testified that he went to Warne's home in Irvington, New York, on March 1, 1976, at approximately 3:40 A.M. in connection with an investigation into the death of Angelo Oliverri (H102-104; A115-117). According to the detective, Warne was asked to accompany them to the Precinct so that he could be of assistance in connection with their investigation (H105; A118). While the detectives did not have their guns drawn, two local Irvington Police Officers who were stationed outside, were armed with shotguns, which they were holding in their hands (H105-106; A118-119). After Warne agreed to accompany the witness and three other New York City Detectives to the 46th Precinct Station House, they proceeded to the Precinct where Warne was asked by Kozlowski for a statement relating to his whereabouts on March 29, 1976 (H105-106, 107-108; A118-119, 120-121). After having a cup of coffee together, Warne provided the detective with a statement describing his activities on the previous evening (H108; A121). There is no indication from the witness' testimony that he ever advised Warne of his constitutional rights prior to obtaining the aforementioned statement (H108; A121).

The initial interrogation was concluded by about 5:00 A.M., at which point the appellant and the detective reviewed Warne's statement while the detective asked questions concerning

the information which had been furnished to him. At approximately 7:00 A.M. the questioning stopped and both men had another cup of coffee (H108-109; A121-122). According to Kozlowski, while Warne was not placed under arrest, he had been informed at his home earlier that he was the target of their investigation (H111-112; A124-125).

At approximately 8:00 A.M., Kozlowski contacted the Secret Service and arranged to have them pick up Warne at the Precinct. Special Agents Vezeris and Hemmer arrived at approximately 10:00 A.M., at which point defendant was placed under arrest (H110-112; A123-125).

According to Kozlowski, immediately prior to his arrest, Warne was advised of his constitutional rights but was "reluctant at that time to make a statement". More specifically, he appeared as though he "couldn't make up his mind what he wanted to do" (H113-114; A126-127). Following a full strip search, the Agents accompanied Warne from the Precinct (H113;A126).

While Warne phoned his wife from the Precinct during the morning, Kozlowski testified that he at no time requested permission to phone an attorney (H114-115; A127-128). Warne remained at the Precinct from 4:00 A.M. to 11:00 A.M. before leaving with the agents (H121; A134).

The appellant RICHARD G. WARME, testified that he was awakened at approximately 3:00 A.M. on the morning of March 1, 1976, by a number of New York City Detectives, who came to his home in Irvington, New York, and indicated that they wished to

question him at a precinct in the Bronx. When Warne told them that he was not going to go with them, two of the four detectives drew guns and stated that they would force him to come with them if they had to. At that point, the appellant reluctantly indicated that he would go along with them. The detectives acknowledged that they had no warrant for his arrest and informed him further that he was not under arrest and that they merely wanted to question him. Before agreeing to accompany them, however, the Detectives indicated that if he did not go with them they would wake up his children and take the entire family along to the Precinct (H122-124; A135-137). As Warne was preparing to leave, the Detectives indicated that they would not permit him to drive his own vehicle to the Station House and seized the keys to the automobile. At that time, the Detectives began to question the defendant's wife, Diana Warne (H124-125; A137-138). As Warne accompanied the Detectives from his home, he noticed that there were approximately 12 local Policemen surrounding his house, two of whom were armed with shotguns (H123; A136).

According to the appellant, the police began to interrogate him in the automobile on the way to the Bronx and continued the interrogation in greater detail once they arrived. In this regard, Warne was never advised of his constitutional rights, including his right to remain silent and to counsel, until those admonitions were given to him later that day by the Federal Authorities (H124-125, 130-131; A137-138, 143-144). From the

very outset, Warne requested permission to phone an attorney but was not permitted to do so (H131; A144).

After arriving at the Precinct, the Detectives spent approximately two hours asking Warne various questions about a man named Buckley, whom he did not know. Finally, the interrogators asked him about Angelo Oliverri, who he admitted knowing for approximately 15 or 20 years, indicating further that they were in business together and continued to work together. In response to the Detectives' questions relating to whether the appellant knew that Oliverri had been shot, Warne indicated that he had no such knowledge. When the Police told Warne that Oliverri had accused him of the shooting, the appellant indicated his willingness to deny such a fact to Oliverri's face at the hospital where the Detectives said Oliverri was being treated (H125-126; A138-139). Detective Kozlowski then threatened to turn Warne over to the Secret Service if he refused to cooperate with their homicide investigation (H130; A143). The appellant remained in police custody against his will from about 3:00 o'clock in the morning to approximately 11:00 A.M. when the Federal Authorities arrived following a telephone call placed by Detective Kozlowski (H129-130; A142-143). When the Special Agents arrived, Warne was subjected to a full strip search, after which he was advised of his constitutional rights and handcuffed with his hands behind his back (H130; A143). Despite Warne's request that the handcuffs be loosened since they were hurting his hands and turning blue, the Agents insisted that they remain cuffed

behind his back (H130-131; A143-144). After having been advised of his rights, which were read to him from a sheet of paper by the Agents, the appellant indicated that he had "nothing to say" and that he "didn't do anything, I am not guilty of anything" (H131-132; A144-145). While in the automobile, on the way to the Secret Service Field Office located in Manhattan, Warne was told by Agent Vezeris that if he refused to cooperate with the Federal Authorities, he'd probably receive a 20 or 25 year sentence since the "State has you" (H132; A145).

When they arrived at the World Trade Center Garage, the Agents dragged Warne out of the back of the automobile and took him to their office. At that time, Warne was "half asleep from being up all night and all morning with all these questions and everything" (H132-133; A145-146). When they arrived at the office, Warne requested permission to make a phone call and was told that he would have a chance to make a call later on (H133; A146). At that time, he also asked for permission to call his lawyer -- a request he continued to make throughout the interrogation. He was assured by the Agent that he would have an opportunity to make that call. However, he was never permitted to make a phone call to his attorney and it was only due to the fact that his wife contacted a lawyer that one appeared at the Field office later that day (H133, 137; A146, 150).

According to Warne, when the interrogation began at the Field office, he had not slept or eaten since 3:00 A.M. At that

time he was informed that if he cooperated with the Agents in their investigation they would make sure he was released on bond. Despite the fact that he indicated that he had nothing to say, he was asked if he knew Bernie Horowitz, one of his codefendants. Although he admitted knowing Horowitz and Joe Peters, he denied giving Horowitz \$100,000 in counterfeit currency but acknowledged lending him money so that Horowitz could fly to Las Vegas to conduct some business with friends (H135-136; A148-149). Throughout the interrogation Warne was seated in a chair with one hand handcuffed to it (H134; A147). In response to questions relating to Oliverri, Warne denied selling any counterfeit currency to him (H137; A150). According to the appellant, before this interrogation began he was not again advised of his constitutional rights and, in this regard, had not been so advised while in the Agents' automobile on the way to the Field office (H138; A151). He was further questioned about a variety of individuals whose names the Agents had obtained from papers contained in Warne's wallet which had been removed from him along with other personal effects when he first arrived at the Field office (H138; A151). Later on that day when his wallet was eventually returned, Warne was asked to sign a piece of paper which he did not read but which he was told was a receipt (H139-141, 144, 146; A152-154, 157, 159).

Following the period of questioning, the Agents came in and presented Warne with a typed statement which he read.

At that point, he again requested an attorney and refused to sign the statement because -- according to his testimony at the hearing -- it was not true and he had not made such a statement (H142, 144; A155, 157). Thereafter, Special Agent Heavey, the Field supervisor in charge of the investigation, spoke with Warne and informed him that all of his co-conspirators had signed statements against him and indicated that he should sign the statement which had been presented to him. Warne told Heavey that he wouldn't sign the statement since it didn't contain exactly what he had told the Agents (H147; A160). About 10 minutes later, an attorney contacted by Warne's wife arrived at the office and was permitted to speak with him. When the attorney requested permission to see the prepared statement, the Agents declined to allow him to examine it (H147; A160).

THE TRIAL COURT'S DENIAL
OF THE MOTION TO SUPPRESS

At the conclusion of the hearing, the Court rendered the following determination (H148; A161):

"THE COURT: The Court's findings are as follows:

"After receiving full advice repeatedly of all his constitutional rights and the circumstances right from the outset and throughout the proceedings, and prior to any interrogation after having

been advised of these rights and including without limitation his right to remain silent among other things, and also after signing a waiver of his rights, Exhibit 1, the defendant voluntarily and free of any coercion or duress of any kind made the oral admissions of his complicity subsequently furnished the information taken down by the stenotypist as recorded on Exhibit 2.

"The disputed issues of credibility are resolved against the defendant on the basis of the evidence, the probabilities, the circumstances and the evaluation of the demeanor evidence. Suppression of the confessions is in all respects denied.

"So ordered."

POINT I

THE COURT BELOW ERRONEOUSLY PROCEEDED WITH THE TRIAL DESPITE WARME'S INVOLUNTARY ABSENCE, IN VIOLATION OF BOTH RULE 43 F.R.C.P., AND APPELLANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION. SUCH ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF THE FACT THAT EXCEEDINGLY DAMAGING TESTIMONY WAS RECEIVED IN APPELLANT'S ABSENCE FROM A MAJOR WITNESS AND CO-CONSPIRATOR WHICH DIRECTLY CONCERNED WARME'S INVOLVEMENT IN THE CONSPIRACY AND THAT THE COURT WAS REQUIRED TO REOPEN THE EXAMINATION OF ONE OF THE JURORS. ADDITIONALLY, SUCH ERROR WAS COMPOUNDED BY THE TRIAL JUDGE'S FAILURE TO ADOPT CORRECTIVE MEASURES UPON WARME'S RETURN.

At the close of the first day of trial, the government was in the process of eliciting direct testimony from Warme's co-conspirator, Bernard Horowitz, who had been responsible for bringing the defendants Heimerle and Warme together and who was to serve as a major witness on virtually all aspects of the conspiracy against both men. Midway through the government's direct examination, the trial court suspended proceedings and instructed all parties to return at 10:00 AM the next morning (42-43). However, when proceedings resumed at twenty minutes to eleven the next morning, the court, indicating that the defendant Warme was not present, invited the United States Attorney to move to revoke his bail and remand the appellant for the duration of the trial. In an endeavor to obtain a stay of the court's impending order revoking bail and remanding Warme, defense counsel noted that appellant's wife had been ill as a result of her very recent child birth which

occurred on the eve of trial. While counsel was unaware of precisely what had occurred since the previous day's recess, he indicated that he had every reason to expect the appellant in court, having spoken with his aged and ill mother and requested the court's indulgence pending Warne's arrival (45-46; A-166-167). At that point, the following colloquy ensued (46-47; A-167-168):

"THE COURT: His bail is revoked, and I will decide whether it is forfeited if he shows up today, and for the duration of the trial he will be remanded so as to insure his attendance properly.

"Now, does the government desire to go ahead in his absence, in view of his fugitive status at this point?

"MR. NAFTALIS: Your Honor, the government humbly begs the court to wait a short period of time.

"THE COURT: Very well. We will wait."

Immediately following a forty minute recess and without any further colloquy the court resumed the bench and stated (47; A-168):

"THE COURT: It is now 11:20. There is no sign of the defendant Warne. His bail has been revoked. There has been no explanation for his absence.

"Federal Rule of Criminal Procedure 43 provides in part:

"'In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the rendering of the verdict'.

"Accordingly, this case having proceeded and the court, the jury and counsel having been unnecessarily detained by the defendant Warne's voluntary and unexplained and unexcused absence, we will proceed with the trial.

"Bring in the jury."

While counsel, obviously concerned about the court's statement remanding the defendant during the remainder of the trial and revoking his bond, did not object to the court's order, neither did he in any fashion whatsoever consent to proceeding in the defendant's absence.

Immediately prior to the resumption of Horowitz's direct testimony, the court received a note from a juror indicating her concern because she had forgotten to mention when questioned during jury empanelment the preceeding day, that her father was a retired police officer (Court's Exhibit III; 53; A-164). In light of the juror's concern, counsel for the defendants were invited by the court to suggest questions which the court could ask the witness in order to determine her impartiality in light of her note. A specific question was posed by Warne's attorney which sought to ascertain whether the juror would give greater weight to the testimony of a law enforcement officer merely because of his position as such in light of her own particular experiences regarding her father. While the juror's responses apparently satisfied all parties, the entire procedure was conducted in Warne's absence and was never again referred to by the court upon his return (53-55; A-174-176)

Throughout the remainder of the morning, the government continued to elicit direct testimony from Horowitz -- testimony which dealt almost exclusively with Warne's involvement in the conspiracy alleged in the indictment. In this regard, the witness recounted his efforts, at Warne's insistence, to dispose of approximately \$50,000.00 worth of counterfeit currency while on a trip to Las Vegas, paid for by Warne; appellant's participation in doctoring those bills so that they could be passed more easily; the method utilized by Warne, Peters and Horowitz to package the counterfeit for transportation to Las Vegas; the aborted Las Vegas trip, followed by Horowitz's return to New York and the return of the \$50,000.00 in counterfeit notes to Warne and Peters (56-63; A-177-184). The witness further testified in great detail regarding his attempt, at Warne's insistence, to pass counterfeit currency at Gimbel's Department store located in Cross County Shopping Center in Yonkers, New York, which resulted in the seizure of a \$100.00 counterfeit note and which eventually led to Horowitz's arrest (63-68; A-184-189).

Additionally, the prosecutor explored a number of details relating to Warne's first purchase of counterfeit currency from Heimerle following their introduction (70-74; A-192-196).

At the conclusion of Horowitz's direct examination, counsel for Heimerle commenced his cross examination which

included various references to Warne's involvement in the conspiracy (109, 111; A-231, 233).

By the time the court resumed at 2:00 PM, following the luncheon recess, the appellant Warne had appeared and was present. According to the statement placed on the record at that time by defense counsel, Warne had been delayed as the result of his wife's having hemorrhaged and the fact that he was constrained to rush her back to the hospital. Additionally, counsel explained that Warne was needed to care for his several young children, since there was no one with whom they could have been left. Thereafter, counsel requested that the court vacate the bench warrant issued earlier that morning and reinstate defendant's bail. Before granting that application however, the court expressed its concern that Warne had neglected to telephone the clerk of the court or defense counsel's office when it became obvious that he could not be in court on time.

At that point, Warne explained that he had attempted to phone the court that morning, indicating that his first call was placed to the clerk of the court at 10:30 AM, at which time he was informed that since the trial was in progress they could not interfere. He further indicated that he telephoned Judge Pollack's chambers at approximately twenty minutes after eleven and spoke with the judge's secretary. When asked what

he had done between 10:30 and 11:20 AM, Warne indicated that "I assume they couldn't reach you". Having satisfied himself as to the validity of Warne's explanation, Judge Pollack indicated that he would "overlook" Warne's absence this time and warned him that further absences would be dealt with should they occur in the future. The judge then reinstated bail and vacated the bench warrant (114-116; A-236-238). At no time did the trial court take any corrective measures to cure any prejudice caused Warne by his absence. Nor did the court attempt to obtain an express and knowing waiver of his constitutional right to confrontation.

Turning to the considerations of law presented by the events described above, it is beyond question that by continuing the trial in Warne's absence without first trying to ascertain whether Warne had in fact absconded or had been delayed involuntarily by reason of events over which he had no control, the court violated appellant's Sixth Amendment right to confrontation. As noted by this court in United States v. Toliver (541 F.2d 958, 964 (2d Cir. 1976)) which was decided nearly a month prior to the occurrences complained of herein:

"Absent an express waiver or misconduct on (defendant's) part amounting to a waiver, the trial judge's action in proceeding with trial in the absence of (defendant) and over her counsel's objection denied her a fundamental constitutional right guaranteed by the Sixth Amendment, which provides that '(i)n all criminal prosecutions the accused shall enjoy the right--to be confronted with

the witnesses against him.' One of the most important rights provided under the clause 'is the accused's right to be present in the courtroom at every stage of his trial.' Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed. 2d 353 (1970). Even when a defendant has expressly or implicitly waived his right to be present in the courtroom, as he may, see id.; Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), his trial should not routinely proceed but rather the trial judge should exercise his discretion to continue taking testimony 'only when the public interest clearly outweighs that of the voluntarily absent defendant.' United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir.) Cert. denied, 409 U.S. 1063, 93 S.Ct. 554, 34 L.Ed.2d 516 (1972). Here, as the government concedes, there is no indication that (defendant) waived her right to be present, as was the case in Tortora; her illness was genuine, and her counsel objected to the taking of testimony against her in her absence. While we recognize that while absence or delay on the part of a defendant in a multi-defendant trial often poses a vexatious problem for the trial judge, who is naturally reluctant to adjourn the trial or grant the severance, either of which courses inevitably leads to delay, expense, and loss of valuable time, no other course can be condoned in the absence of a waiver or misconduct by the defendant necessitating his removal to permit trial to proceed. See, e.g., Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970)." (See also, United States v. Taylor, -F.2d-, (2d Cir., decided April 13, 1977, slip op. 2805, 2828); United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968); United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973); Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968)).

Unfortunately, the trial court below did exactly what is proscribed by Toliver. That is, it proceeded in a routine fashion as if the absence of the defendant had been clearly established to be willful and without regard to the very distinct probability suggested by defense counsel's remarks regarding his family situation, that

such absence was in fact involuntary and due to causes beyond Warne's control.

While defense counsel did not object to the trial judge's insistence on proceeding in Warne's absence, it is plain that any such objection would have been futile (see United States v. Clark, 475 F.2d 240, 247 n.6 - 248 (2d Cir. 1973)), and could have exacerbated the situation with respect to the court's revocation of Warne's bail and its indication that it was prepared to remand appellant for the duration of the trial. Of significance in this regard, is the fact that the prosecutor, when questioned on whether to proceed by the court, indicated a desire not to proceed without the defendant. Despite that clear indication, the court waited only forty minutes before resuming the testimony (47; A-168). Finally, in this regard, such a constitutional deprivation constitutes plain error which this court must correct despite the absence of any objection appearing on the record (United States v. Clark, supra at 247 n.6 - 248; Rule 52(b) F.R.C.P.).

Having established an error of constitutional dimension, Warne's conviction must be reversed unless the government can establish that the error is harmless, beyond a reasonable doubt (Chapman v. California, 386 U.S. 18, 22 (1967)), or, to state it another way, that the error of constitutional dimension "in the setting of a particular case (is) so unimportant and insignificant" that it does

not require automatic reversal (United States v. Toliver, supra at 964; citing Chapman v. California, supra).

A simple review of the facts set out at the beginning of this Point clearly demonstrates that the Court's error may not be viewed as harmless beyond a reasonable doubt. To begin with, the testimony elicited by the government on direct examination of co-conspirator Bernard Horowitz, who was the essential figure in bringing Heimerle and Warne together, directly concerned Warne's involvement in the conspiracy. The testimony relating to Warne taken in his absence was by no means merely incidental to other relevant testimony concerning his codefendant. It was, rather, essential to the issue of Warne's guilt or innocence and related specifically to several of the overt acts pleaded in the indictment.

Moreover, when Warne was finally able to appear that afternoon, the trial judge took no corrective measures whatsoever in order to cure any prejudice caused to him by his absence such as advising him of the proceedings held in his absence; arranging for him to have a copy of the transcript of the proceedings; and offering to have the prosecutor reexamine Horowitz to the extent that he testified during his absence (United States v. Taylor, supra, slip op. at 2828; United States v. Toliver, supra, at 965).

Finally, the record reflects that the court reopened the jury selection process in order to permit further voir

dire of one of the jurors following receipt of a note indicating her concerns with respect to answers given in response to questions asked on voir dire. Indeed, counsel for Warne was sufficiently troubled by the juror's note so that he requested additional inquiries be made in order to resolve the problem. In this connection, it is significant to note that this Circuit has developed a per se rule which requires automatic reversal when a defendant has been denied his right to participate in the jury selection process on the theory that a defendant's absence during the impaneling of a jury is too basic to be treated as harmless (United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), United States v. Toliver, supra at 964-965).

Under the circumstances, it cannot be said that the violation of the defendant's right of confrontation was harmless beyond a reasonable doubt.

POINT II

THE TRIAL COURT'S FAILURE TO PROPERLY
EVALUATE THE ADMISSIBILITY OF WARME'S
CONFESSION AT THE PRE-TRIAL HEARING
FOLLOWED BY THE RECEIPT OF THAT CON-
FESSION AT TRIAL, NECESSITATES A
REVERSAL OF APPELLANT'S CONVICTION.

A

THE TRIAL JUDGE'S FAILURE TO CONSIDER
WHETHER WARME'S CONSTITUTIONAL RIGHTS
WERE INFRINGED BY CONTINUED QUESTIONING
DESPITE HIS REQUESTS TO SPEAK WITH AN
ATTORNEY -- A CIRCUMSTANCE ESTABLISHED
BY THE VERY TESTIMONY OF THE FEDERAL
AGENT CONDUCTING THE INTERROGATION --
REQUIRES REVERSAL OF THE JUDGMENT OF
CONVICTION OR, IN THE ALTERNATIVE,
REMAND TO THE TRIAL COURT FOR RESOLU-
TION OF THE ISSUE.

According to the testimony developed on the govern-
ment's case at the pre-trial suppression hearing, following
his seven hours of police interrogation at the Ninth Homi-
cide Squad in the Bronx, Warme was formally arrested by
agents Hemmer and Vezeris at 10:30 AM on March 1st, 1976.
Thereafter, he was advised of his constitutional rights,
and taken to the Secret Service Field Office located at
the World Trade Center in Manhattan (H-6-8, 20-21, 27-29;
A-19-21, 33-34, 40-42). While there was disagreement be-
tween the two agents as to whether Warme was interrogated
in the automobile after again being advised of his consti-
tutional rights, both agreed that he was eventually inter-
rogated at length at the field office after he executed
the waiver and consent form setting forth his constitutional

rights (H-7-10, 27-31, 63-70; A-20-23, 40-44, 76-83). While it is conceded that Warne requested permission of the agents to consult with a lawyer by telephone, Agent Vezeris believed that Warne made the request toward the end of the interrogation, while Agent Hemmer, the agent who was conducting the interrogation, testified as to his belief that Warne may have requested a lawyer during his interrogation and prior to dictating his statement to a stenographer (compare, H-13, 44-45; A-26, 57-58, with H-81-84; A-94-97).

The thrust of Agent Hemmer's testimony, which is set out in full at pages 15-17, supra, was to the effect that Warne may well have requested an attorney in the midst of questioning and, further, that the agents may have continued to question him unless he "emphatically (stated that he) wants a lawyer". The clear indication from Hemmer's testimony was that Warne could well have requested permission to consult with his lawyer by telephone -- a request which Warne testified he made on numerous occasions throughout the entire interrogation and which was refused by the agents (H-133, 137; A-146, 150) -- and that despite such a request, the interrogation was continued.

There can be little question that once a suspect who may have initially waived his right to remain silent and to counsel, requests an attorney during the interrogation, questioning must cease until an attorney is present.

From that moment, the individual must have an opportunity to confer with the attorney and, if he so desire, to have him present during any subsequent questioning (Miranda v. Arizona, 384 U.S. 436, 473-74 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964)).

In passing upon the admissibility of the confession, the court below merely held that Warne had been properly advised of his rights and voluntarily confessed free of any coercion or duress. The court never confronted the issue of whether Warne requested counsel during the course of the interrogation, thereby requiring that the interrogation terminate until he had had an opportunity to confer with counsel (H-148; A-161) and, in this regard, "there is significant evidence that an important doctrine of law was simply ignored" (United States ex. rel Lewis v. Henderson, 520 F.2d 896, 903 n. 7 (2d Cir. 1975)).

To the extent that the court can be viewed to have tacitly passed on the issue, however, the evidence given by the special agent conducting the interrogation requires that the trial judge's denial of the motion to suppress be reversed and that the judgment of conviction be set aside. Such evidence strongly supports and corroborates the testimony given by the defendant that he continually requested permission to confer with counsel by phone. When that evidence is considered in light of the fact that Warne's wife retained an attorney who appeared at the field office later that afternoon, it seems

clear that the issue cannot be shunned merely by claiming, as did the court below, that "the disputed issues of credibility are resolved against the defendant on the basis of the evidence, the probabilities, the circumstances and the evaluation of the demeanor evidence".

To the extent that this tribunal determines that the trial judge failed to consider the crucial question relating to Warne's Fifth and Sixth Amendment rights to counsel, and further believes that it may not resolve the issue itself, then, at the very least, the instant proceeding must be remanded to the trial court for an express determination of this crucial question of law.

Finally, before concluding this branch of our argument, we wish to note that the evidence presented at the pre-trial hearing substantiates the view that Warne's confession was not in fact voluntary and that the court's conclusion to the contrary was clearly erroneous. To begin with, Warne's confession was not obtained by the federal agents until some seven to nine hours after his detention and interrogation had been commenced by New York City Police Detectives (see Sub-Point B, infra). As a result, the defendant had been without sleep since approximately 3:00 AM and, according to his testimony at the hearing, maintained that he was sleepy throughout his entire interrogation (H-132-136; A-145-149). In this regard, Agent Hemmer acknowledged that it was possible that Warne may have stated

that since the agents' case was so strong they might as well lock him up so he could get some sleep (H-78-79; A-91-92).

Concerning the propriety of the admonitions given Warne during his interrogation, it's significant to note that the New York police apparently never advised Warne of his constitutional rights prior to conducting their interrogation which, as indicated, lasted for some seven hours (H-108; A-121; H-124-125, 130-131; A-137-138, 143-144). Moreover, according to the testimony of the detective conducting Warne's interrogation, when the federal agents first advised him of his constitutional rights when he was placed under arrest at the precinct, Warne was "reluctant at that time to make a statement". More specifically, he appeared as though he "couldn't make up his mind what he wanted to do" (H-113-114; A-126-127). The significance of this testimony is underscored by Agent Hemmer's admission that he told Warne that the agents had a great deal of evidence against him and that he was facing a long prison sentence if he did not cooperate with them. Additionally, appellant was informed that such cooperation could work to his benefit (H-65-66; A-78-79).

Under the circumstances, even if Warne executed the waiver and consent form -- a point which he vigorously disputed at the hearing -- it's clear that such a waiver was not freely made but rather was produced by the psychological pressures employed by the law enforcement agents in

endeavoring to obtain his confession. When properly viewed in light of Warne's persistent requests for counsel during the course of the interrogation, the evidence developed at the hearing indicates clearly that the confession was in fact involuntary within the meaning of Section 3501 (a) and (b) of Title 18, U.S.C.

Under the circumstances, Warne's confession must be suppressed and the judgment of conviction reversed.

B

THE TRIAL COURT'S FAILURE TO DETERMINE THAT WARME'S CONFESSION WAS MADE WITHIN SIX HOURS IMMEDIATELY FOLLOWING HIS DETENTION BY THE POLICE OR THAT ANY DELAY WAS OTHERWISE REASONABLE, AS MANDATED BY SECTION 3501 (c) OF TITLE 18, U.S.C. REQUIRES REVERSAL OF THE CONVICTION, OR, IN THE ALTERNATIVE, REMAND TO THE TRIAL COURT FOR RESOLUTION OF THE ISSUE.

On March 1st, 1976, at approximately 3:00 AM, four New York City Homicide Detectives took the appellant Warne into custody at his home in Irvington, New York and forcibly brought him to the Ninth Homicide Squad in the Bronx where he was interrogated and remained until some time between 10:30 and 11:00 AM, at which point he was placed under arrest by federal agents and removed to the Secret Service Field Office in Manhattan (A135-138, 142-145; c.f., A115-122, 123-125, 134).

According to the testimony of Agent Vezeris at the pre-trial hearing, upon arrival at the field office Warne was interrogated for approximately an hour, during which time he confessed and dictated a full statement to a secretary. He remained at the office for a period of time estimated to be approximately an hour and a half to four hours. Warne's arraignment took place either later that day or the next day (A25-26, 51, 56-57).

Section 3501 (c) of Title 18, U.S.C. states that a confession is not made inadmissible solely because of the delay in bringing the accused before a magistrate if (1) the trial judge finds that the confession was voluntary, (2) the weight to be given the confession is left to the jury, and (3) the confession was made "within six hours immediately following his arrest or other detention" with this proviso:

"Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer".

Despite evidence reflecting the fact that Warne's confession was not obtained until some seven to nine hours after his initial detention, during the course of which he was continually interrogated concerning both the homicide of Angelo Oliverri and the counterfeiting conspiracy involved herein, "the record shows no consideration by the

trial judge of the delay factor's effect, if any, upon the voluntariness of the confession and no determination of reasonableness as provided by subsection (c). In the circumstances the case must be remanded for consideration of the delay factor in accordance with Section 3501" (United States v. Keeble, 459 F.2d 757, 761 (8th Cir. 1972), reversed and remanded on other grounds 412 U.S. 205 (1975); see also United States v. Goss, 484 F.2d 434 (6th Cir. 1973)). Examination of the court's denial of the appellant's motion to suppress the confession reveals that, as in Keeble, no consideration was given to the delay factor at all by the court (148; A-161). Under the circumstances, it was error for the confession to have been admitted at trial.

While we are not unmindful of various rulings precluding periods of delay caused as a result of state detention from consideration in connection with applications to suppress pursuant to Rule 5(a) F.R.C.P. (see, United States v. Elliott, 435 F.2d 1013, 1015 (8th Cir.), but see, United States v. Coppola, 281 F.2d 340 (2d Cir. 1960); United States v. Chadwick, 415 F.2d 167 (10th Cir. 1969)), the express language of Section 3501 (c) appears to resolve any question along these lines. Under the provision, in order to determine whether the confession is inadmissible solely because of delay in bringing a defendant before a commissioner or other officer, the period to be calculated is the time "while such person

was under arrest or other detention in the custody of any law-enforcement officer of law-enforcement agency"

In our view, the above quoted portion of the section clearly reflects congress's intent that both state and federal custody be included in the calculations required of the trial court.*

The period of delay is particularly significant in light of the very close issues relating to the totality of the circumstances surrounding Warne's confession. Stated another way, while the court determined that Warne confessed voluntarily, that determination cannot stand if significant factors required by law to be considered by the trial judge have been omitted, particularly where the question of voluntariness is as close as it is herein. (See Sub-Point II A, supra).

*In both United States v. Johnson (467 F.2d 630, 637 (2d Cir. 1972)) and United States v. Halbert (436 F.2d 1266, 1232 n. 4 (9th Cir. 1970)) the Second and Ninth Circuits each assumed for the purpose of their decisions that the quoted words include both state and federal custody without finding it necessary to actually reach the question.

POINT III

IN REDACTING WARME'S CONFESSION IN ORDER TO PERMIT ITS RECEIPT IN EVIDENCE WITHOUT PREJUDICE TO APPELLANT'S CO-DEFENDANT, THE COURT ELIMINATED VARIOUS PASSAGES FROM WHAT WAS OTHERWISE A HIGHLY ARTICULATE AND SEEMINGLY COMPLETE CHRONOLOGY OF EVENTS. SINCE WARME'S DEFENSE AT TRIAL WAS THAT THE FEDERAL AGENTS HAD FABRICATED THE CONFESSION BY DICTATING THE STATEMENTS THEMSELVES UTILIZING AVAILABLE INFORMATION OBTAINED FROM OTHER SOURCES, ANY SUCH ALTERATION OR REDACTION SUBSTANTIALLY PREJUDICED THE APPELLANT AND DENIED HIM A FAIR TRIAL.

The defense advanced by Warne at trial, insofar as it related to the matter of his confession, was in essence, that the federal agents had fabricated the confession and had dictated it themselves utilizing available information obtained from various other sources including Warne's alleged co-conspirators who had been cooperating with the government. In order to demonstrate that fact, several essentials had to be proved. First, it was necessary to show that the warning and consent form purportedly signed by Warne had, in fact, been obtained by claiming the paper was a receipt which the defendant was required to sign in order to obtain the return of his personal effects which had been removed during his detention by the federal agents. Next, it was essential to convey to the jury the fact that Warne did not himself dictate the "confession," as claimed by Special Agent Vezaris (470-471, 500-501). The conclusion which the defense sought to have the jury draw from this was that one or both of the special agents conducting

the interrogation had actually dictated the substance of the statement to a stenographer and that Warne refused to sign the documents because it was not his declaration. Finally, in this regard, the defense would attempt to show that the agents had interviewed other co-conspirators who had supplied insight into the actual workings of the conspiracy, and would attempt to show further, that it was probable that Warne did not execute a warning and consent form since no such written waivers or written confessions had been obtained from other co-conspirators who already had been interviewed by the agents.

The only witness called on Warne's behalf at trial was Special Agent Hemmer who, along with Vezeris had conducted the interrogation and who had been the agent supposedly in charge of questioning Warne (465-468, 497-498, 500-501). Hemmer's testimony strongly contradicted much of what Special Agent Vezeris had testified to as part of the government's case and tended in large measure to support the defendant's position with respect to the confession. To begin with, he testified that it was "procedure" to have an accused empty his pockets at the Secret Service Field Office and admitted further that they had obtained various items from Warne after he had emptied his pockets at the office (518). In this connection, Hemmer acknowledged that when these items were returned to Warne, the agents did not obtain a signed receipt from him although that is a normal procedure (519-520). According to the

witness, no waiver and consent forms or written statements were obtained from other co-defendants interviewed by him, such as Horowitz, Peters and co-conspirator Fred Glock (515-517). Hemmer also acknowledged that he had told Warne that all other co-conspirators had made statements (515).

On the pivotal point of who actually dictated the confession, Hemmer acknowledged that he had observed Special Agent Vezeris talking to the stenographer while she was writing and prior to typing appellant's statement (522). Moreover, he stated that he did not see Warne "dictate" a statement to the stenographer (522-523).

While it is impossible to know what impact Hemmer's testimony had upon the jury and to what extent the jury relied upon Warne's confession to convict him of conspiracy, we are able to ascertain that the confession, as submitted to the jury in redacted form, was clearly less coherent and articulate than its original version (compare Government's Exhibit 10 in evidence, A-405-407, with Government's Exhibits 11 and 12 for identification, A-408-410, A-411-413).

Additionally, the redacted confession omitted reference to particular incidents and meetings which were testified to by the co-conspirators at trial and which supported Warne's contention that the agents had obtained this information from those co-conspirators and had fabricated the entire confession in that manner.

While the technique of redaction is clearly an acceptable method of avoiding prejudice to a non-declarant in

a joint trial, while permitting the government to utilize a confession against its maker "of course, the deletion must not be such that it will distort the statements to the substantial prejudice of ... the declarant...." (Bruton v. United States, 391 U.S. 123, 143 (1968) (White, J., dissenting); see also People v. LaBelle, 18 N.Y. 2d 405, 411 (1966) ("unless 'all parts of the extra judicial statements implicating any co-defendant can be and are effectively deleted without prejudice to the declarant' they are inadmissible in a joint trial"); United States ex rel LaBelle v. Mancusi, 404 F.2d 690, 692 n. 1 (2d Cir. 1968) United States v. Deegen, 268 Fed. Supp. 580, 595 n. 19 (S.D.N.Y. 1967)).

In People v. LaBelle, supra, the New York State Court of Appeals reversed the murder conviction of the defendant whose statement had been redacted at a joint trial to avoid prejudice to his co-defendant. In redacting the statement however, exculpatory portions were excised to the defendant's prejudice. In concluding that LaBelle was entitled to a new trial, the court made the following relevant observations (18 N.Y. 2d at 410):

"The redacted statement thus took on an entirely different import from that found in the original statement. It also distorted the picture of the events the prosecution presented to the Grand Jury.****

"If there had not been a joint trial, Richard LaBelle would have been entitled to have his entire statement, including the exculpatory

portions, put into evidence, rather than this warped version of what he had told the State Police".

While we do not claim that the redacted portions of Warne's statement were exculpatory, in the context of this case exclusion of the redacted portions interfered with the presentation of Warne's defense to his substantial prejudice. And, in this regard, a timely objection was advanced at trial upon these grounds. (359-365, 445-446, 448-456; A-253-259, 262-263, 265-273).

As discussed at length elsewhere in this brief (see Point IV, infra), the significance of this error is underscored when considered in light of the fact that the jury was unable to agree upon a verdict with respect to any count except the conspiracy, and reported at the time it rendered that verdict, that "some jurors are not willing to accept any of the testimony from those witnesses who were co-conspirators -- whether named in the indictment or not" (Court's Exhibit 12; A-419; see also Court's Exhibits 10 and 11; A-417-418). In light of these circumstances, any prejudice which resulted from admission of the confession takes on added significance and requires that the judgment of conviction be reversed.

POINT IV

THE TRIAL JUDGE'S REFUSAL TO PERMIT
DEFENSE COUNSEL TO OBTAIN RELEVANT
STATEMENTS OF WITNESSES RELATING TO
THE SUBJECT MATTER OF THEIR DIRECT
TESTIMONY WAS CLEARLY ERRONEOUS AND
IN VIOLATION OF SECTION 3500 OF
TITLE 18, U.S.C.

In accordance with the procedures suggested by the trial court below, the prosecutor turned over to the defendants two typewritten pages (Defendants' Exhibit "A", for identification) consisting of reports prepared by special agents assigned to the investigation leading to defendants' arrests. However, the prosecutor refused to deliver a number of other reports prepared by various special agents to the defendants. At trial, a specific request was made for these reports which was denied by the court initially on the strength of the prosecutor's statement that neither 3500 material nor Brady material was contained therein, and subsequently on the basis of the court's inspection of the several reports involved in defendants' request (355-357, 438-439, A-250-251; see disputed material marked Court's Exhibit "4").

In response to the court's inquiries, the Government prosecutor indicated that the reports in question related to an active investigation pending before the Federal Grand Jury in which one of the two defendants on trial was a possible target and further stated that the balance of the material in question "deals with

the matter of Mr. Joseph Corbo" (357; A-250), who, while unindicted, was, according to the prosecution's theory of the case, a co-conspirator (196, 226-227, 201-204, 260-266, 427-430).

Following the court's refusal to provide counsel with the requested material, Special Agent Samuel J. Zona, United States Secret Service, testified that on January 6, 1976, Joseph Corbo was arrested by special agents of the Secret Service after having sold counterfeit currency in \$20, \$50 and \$100 denominations to Zona who was then acting in an undercover capacity. Following Corbo's arrest, Zona and Corbo met with Angelo Oliverri who was subsequently arrested after he received \$3,500 as payment for the counterfeit currency sold to Agent Zona by Joe Corbo earlier (427-430). At trial, the \$40,000 in counterfeit currency purchased from Joseph Corbo on January 6, and for which the undercover agent eventually paid Angelo Oliverri \$3,500 in cash, was received in evidence against Warne as Exhibit "5" (430-432).

Following Agent Zona's testimony, the court and counsel for Warne engaged in the following discussion relating to the purported 3500 material (438-439):

"THE COURT: I have marked as Exhibit "4" the material that someone thought might contain 3500 material. I went through it. I heard the witness testify, also, and in my judgment there is absolutely nothing in there that is 3500 material that the Government should have turned over to the defense.

"MR. WEINGARD: The only thing I can say with respect to the Court's observation is that in the last witness' field report, he makes reference -- or reference is made to all reports of the Special Agent leading up to the arrest of Joseph Corbo, January 6, 1976.

"I would certainly like to see that because it bears upon a direct involvement with the last witness.

"THE COURT: Yes. Well, there is nothing that I can find in that report that represents 3500 material in relation to this witness' direct examination."

In light of the fact that the information which formed the basis of the special agent's report was obtained by the agent in the course of his investigation, and since the nature and result of that investigation constituted the substance of that witness' direct testimony, the documents must be deemed sufficiently related to the witness's testimony to warrant production under the Jencks Act (See United States v. Cleveland, 507 F.2d 731, 735-736 (7th Cir. 1974)). And, the court's failure to provide the defendant with significant materials under Section 3500 requires reversal if there is "a significant chance that this item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction" (United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974) cert. denied 420 U.S. 962, cert. denied 421 U.S. 949 (1975); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969); United States v. Houle, 490 F.2d 167, 171 (2d Cir. 1973); United States v. Fried, 486 F.2d 201, 202-203 (2d Cir. 1973); United States v. Badalamente, 507 F.2d 12, 16-18 (2d Cir.

1974); United States v. Pacelli, 491 F.2d 1108, 1119 (2d Cir. 1973)).

In reviewing the propriety of a refusal to produce statements pursuant to this section, the appropriate standard for review requires that the Appellate Court not speculate as to the manner in which statements might have assisted counsel in cross-examination, but rather, the court should confine its attention to a determination of whether the statements related to the witness' direct testimony, and, if so, whether it was perfectly clear that the defendant was not prejudiced by their non-disclosure (United States v. Cleveland, supra at 736). Even if the court were to evaluate the impact which such material might have had with respect to the case against each defendant in view of the nature and quantum of the evidence against each (see United States v. Sterling, supra at 1333), a reversal is, nevertheless, required with respect to Warme.

To begin with, while the jury below agreed upon a verdict convicting both defendants of the crime of conspiracy, the jury simultaneously informed the court that it was unable to agree upon the three substantive charges noting that some of the jurors refused to "accept any of the testimony from those witnesses who were co-conspirators -- whether named in the indictment or not." (Court's Exhibits 10, 11 and 12 for identification; A-347-352, 417, 418, 419). In light of the difficulty experienced

by some of the jurors in accepting any testimony whatsoever from the five co-conspirators who testified against defendants at trial, it becomes clear that the testimony of the several special agents and other police witnesses became crucial in the jury's assessment of Warne's guilt -- particularly in light of the fact that a confession purportedly made to two special agents was received in evidence against him (see Points II and III, supra). Since a resolution of Warne's guilt or innocence appears to have directly turned on the credibility of the government's investigation, as opposed to the believability of the co-conspirators' testimony, the reports prepared by those agents who testified which related directly to the subject of their testimony may well have been the significant difference between a conviction and the ability to "have induced a reasonable doubt in the minds of enough jurors to avoid a conviction" (United States v. Sterling, supra, at 1333; United States v. Miller, supra at 832).

Before concluding this branch of the argument, we turn briefly to the parallel consideration of whether any of the reports prepared by the government contained material required to be turned over pursuant to Brady v. Maryland (373 U.S. 83, 87 (1963)). In this regard we wish to note that upon cross-examination of Special Agent John Vezaris, counsel for defendant Warne developed the fact that following Angelo Oliverri's arrest and eventual cooperation with the government, Vezaris, while acting as an undercover agent,

attempted to buy counterfeit currency from Warne. However, when approached by Vezaris appellant stated that he did not know what Vezaris was talking about and refused to engage in any illegal activity (486). None of the material supplied by the government to defense counsel contained any references to the incident described. Had it not been for Warne's ability to recollect and identify Vezaris at trial, such testimony never would have been developed. While we have complete confidence in the integrity and fairness of the government attorney who prosecuted this case below, we are nevertheless constrained to ask this Court to carefully scrutinize the 3500 material for possible Brady matter inadvertently withheld from defendant.

POINT V

PURSUANT TO RULE 28(1) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT ADOPTS ALL RELEVANT POINTS CONTAINED IN CO-APPELLANT'S BRIEF.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR, IN THE ALTERNATIVE, A NEW TRIAL GRANTED.

Respectfully submitted,

JEFFREY WEINGARD
Attorney for Appellant,
RICHARD G. WARNE

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

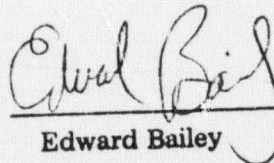
EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of August, 19 77 at No. 1 St. Andrews Pl, NYC


deponent served the within Brief upon

U.S. Atty., So. Dist. of NY
ASSR. U.S. Atty. Allan Naphthalis

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
15 day of August 1977.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

COPY RECEIVED
ROBERT B. FISKE JR.
AUG 15 1977
U. S. ATTORNEY
SO. DIST. OF N. Y.